

KENT S. ROBINSON
Acting United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

JOHN CRUDEN
Acting Assistant Attorney General
SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney
BRIDGET McNEIL, Trial Attorney
MICHAEL R. EITEL, Trial Attorney
Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civil No. 01-640-RE

**FEDERAL DEFENDANTS'
COMBINED REPLY
TO PLAINTIFFS' RESPONSE
TO THE ADAPTIVE
MANAGEMENT
IMPLEMENTATION PLAN**

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INTRODUCTION

This review process began at our April 2, 2009, meeting when the Court held up a newspaper clipping for the entire group, noting that the Obama Administration had reviewed and ultimately decided to withdraw the northern spotted owl critical habitat designation. The Court then asked the Obama Administration to review the Federal Columbia River Power System (“FCRPS”) 2008 Biological Opinion (“BiOp”) and determine whether the agencies had complied with the Endangered Species Act (“ESA”). The State of Oregon, National Wildlife Federation plaintiffs (“NWF”), as well as the Nez Perce Tribe as *amicus* (collectively “Plaintiffs”) actively encouraged the Administration’s review, and as noted in the Plaintiffs’ responses, this review was lengthy and required multiple extensions from the Court. The length of time is indicative of the level of care the Administration brought to this review process and ultimately the development of the Adaptive Management Implementation Plan (“AMIP”).

This review and the development of the AMIP enlisted the aid of expert scientists inside and outside the government, and was guided and chaired by the NOAA Administrator, Dr. Jane Lubchenco, who is herself a highly regarded scientist in the field of ecology and environmental sciences. Dr. Lubchenco, as well as other Administration leadership, spent a great deal of time learning the complexities of the FCRPS, appreciating the science issues and the legal arguments both for and against the 2008 FCRPS BiOp. They also heard directly from the Plaintiffs. This review and the Plaintiffs’ presentations admittedly produced considerable scientific debate and questioning as to reasonableness of the assumptions and the conclusions to be drawn from the available data. After carefully considering all of this, Dr. Lubchenco, with the aid of her colleagues, concluded that the Reasonable and Prudent Alternative (“RPA”) for the operation of the FCRPS system, as implemented through the AMIP, is not likely to jeopardize the continued

existence of the species nor destroy or adversely modify critical habitat. *See* September 14, 2009, Letter from Dr. Jane Lubchenco to Action Agencies at 2-3 (“NOAA Letter”); *see also* September 11, 2009 Letter from Action Agencies to NOAA Fisheries (“Action Agency Letter”).

Scientific debate and technical questioning should take place among scientists. That is the appropriate forum in which to evaluate whether the BiOp is biologically and scientifically sound, and that is exactly what occurred here. The 2008 BiOp corrected the identified flaws in the 2004 BiOp, and now, the AMIP addresses many, if not all, of the Court’s additional concerns by accelerating actions, building on the RPA’s robust monitoring system, and providing a contingency plan with readily identifiable biological triggers and implementable actions if the unforeseen occurs and those triggers are tripped. Predictably, Plaintiffs are dissatisfied with the AMIP and seek “the start of a new day” with a BiOp fashioned according to their unilateral set of beliefs, but divorced from the statute, regulations, and case law. NWF Resp. at 38. When the Plaintiffs lose the scientific debate among scientists in the appropriate forum, like the remand collaboration and now the Administration’s review, they turn to this Court arguing that the views of four Federal agencies, three States, six Tribes, and now an entirely new Administration (which has recently withdrawn other inadequate environmental decisions), cannot be believed and that the biologists and scientists from these *ten* sovereigns should *all* be ignored. We agree that regional and national consensus are not substitutes for ESA legal compliance. But the lengthy review process by the new Administration that included hearing the views of highly respected independent scientists and the fact that biologists from different ten sovereigns agree that the analyses and methodologies are reasonable, cannot be ignored.

It is this Administration’s strong desire and hope to use the next eight years of this BiOp to further strengthen their partnerships with the States and Tribes and to implement the beneficial

actions that the salmon and steelhead so rightfully deserve. The alternative is a protracted and bitter legal battle that will consume time and resources, but more importantly cast aside all of the achievements that this Court has sought for so long, including a truly functioning and comprehensive collaboration. To this Administration, the choice is clear.

DISCUSSION

I. THE ADMINISTRATION'S REVIEW AND THE ADAPTIVE MANAGEMENT IMPLEMENTATION PLAN ARE RESPONSIVE TO THE COURT'S CONCERNS AND REFLECT THE BEST AVAILABLE SCIENCE.

As Dr. Lubchenco noted in her letter regarding the AMIP, the “culmination of our recent efforts represents a significant step forward for listed salmon and steelhead in the Columbia and Snake River basins.” September 14, 2009, Letter from Dr. Jane Lubchenco to Action Agencies at 2 (“NOAA Letter”). Contrary to Plaintiffs’ arguments, the first component of the AMIP (accelerated actions, enhancements, and enhanced RM&E) aid NOAA and the Action Agencies in implementing the RPA and will be instrumental in monitoring the effectiveness of the mitigation in the Fish Accords and BiOp. *See* Fed. Defs.’ Resp. at 9. In contrast, the second distinct component of the AMIP (the contingency plan and “triggers”) have nothing to do with monitoring the effectiveness of the mitigation in the Fish Accords and BiOp, but rather is an insurance plan that will be utilized only if there is an unexpected significant decline in the stocks. The former aids in determining whether NOAA’s predictions are accurate, while the latter is a safety net. The Plaintiffs’ attempt to confuse the issue and conflate these two distinct purposes is nothing more than an effort to avoid confronting this Administration’s conclusions on the 2008 BiOp.

A. The BiOp’s Performance Standards and the AMIP’s Enhanced RM&E Are Responsible for Monitoring Whether NOAA’s Predictions are Accurate.

As described in our prior pleadings, the 2008 BiOp was carefully constructed to provide explicit hydro performance standards and contains massive amounts of RM&E in the RPA tables, all of which are designed to ensure each ESU is responding to the mitigation as anticipated. BiOp RPA Table 50-73. The Action Agencies proposed, and NOAA required, multiple performance standards for fish populations, hydro operations, tributary habitat, estuary and ocean habitat, harvest, hatcheries, and predation management, among others. *See* FCRPS BA at B.2.6-5 through B.2.6-20. For example, the Corps will be monitoring juvenile dam passage to ensure that there is 96% dam passage survival averaged across the lower Snake River and lower Columbia dams, and 93% dam passage survival averaged across all dams for Snake River subyearling Chinook. *Id.* at B.2.6-8; *see also* B.2.6-2-5 (8-10) (discussing in-depth juvenile system survival). Likewise, during the course of negotiations on the Fish Accords with the Lower River Tribes and CRITFC, the Tribes required terms that address spill passage efficiency (“SPE”) and guidance by agreeing “that the current delay and SPE metrics described in Attachment A will not be lowered unless they impede survival.” AR Corps 00372 at 005354. As provided in that attachment, there are a suite of passage standards that must be fulfilled under the terms of the agreement. *See e.g. id.* at 005386 (table with required spill passage efficiencies for each dam).

For tributary and estuary habitat, there is annual tracking of project implementation and expert panels will review implementation and effects as new projects are selected for implementation in the next cycle. *Id.* at B.2.6-10, B.2.6-12; BiOp, RPA Table, RPA 35, at 41041 and RPA 57 at 82-83. Underlying all of this is the Action Agencies’ commitment to compile annual progress reviews, *see e.g.*, BiOp RPA Table 4, and comprehensive evaluations for 2013 and 2016 to track the progress of the listed species and the effectiveness of the benefits.

Id. These comprehensive reviews, among other actions, will evaluate: storage project operations, BiOp RPA Table at 4, summarize MOP operations at the lower Snake projects and John Day operating elevations, *id.* at 6; emergency situations; *id.* at 9, re-fill remaining non-Treaty storage; *id.* at 11; actions taken in dry water years, *id.* at 14; dam survival performance standards, *id.* at 22; kelt management, *id.* at 33; tributary habitat, *id.* at 35; estuary habitat, *id.* at 37; compliance with HGMPs for hatcheries, *id.* at 39; predator management, *id.* at 44; as well as compiling all of the RM&E, *id.* at 50. They will also update the metrics and the analysis relied upon in the BiOp to provide a transparent and public review as to whether the listed species are performing as anticipated. These are just some of the measures in the BiOp that ensure that the benefits are being achieved. *See* BiOp, RPA Table 50-73.

The AMIP does not replace these obligations but works in tandem and enhances the existing RM&E in the BiOp. *See* AMIP at 15 (“The provisions of this AMIP inform the measures of the 2008 RPA with greater detail and specificity, and the agencies intend the AMIP to be consistent with the objectives and requirements of the RPA.”); *id.* at 15 (contrasting the new aspects of the AMIP monitoring in yellow with the existing obligations in blue). As part of a precautionary approach, the Administration chose to enhance the existing RM&E in order to augment the geographical coverage and improve the statistical certainty of new data, which in turn better informs future adaptive management decisions optimizing fish survival and productivity. AMIP at 20. There were six specific RM& E enhancements: (1) life cycle monitoring; (2) adult status and trend monitoring; (3) juvenile status and trend monitoring; (4) habitat condition status and trend monitoring; (5) intensively monitored watersheds; and (6) climate change monitoring and evaluation. AMIP at 20-25. These enhancements, in particular the adult and juvenile status and trend monitoring, enhance NOAA’s ability to assess how each

of the ESUs are responding under the BiOp. AMIP at 23 (“The collection and timely reporting of natural adult abundance and productivity data each year at the population scale is needed to detect changes in the status at the species, MPG, or local populations in response to RPA actions.”). By looking at the trends in abundance, the agencies (with the entire region) will be able to closely monitor the status of the fish. *Id.* (“by December 2010, NOAA Fisheries will develop mechanisms for the timely and efficient reporting and dissemination of these data”). And, if the ESUs are not responding as anticipated, NOAA will know through the capabilities in the BiOp and AMIP. *Id.*

The Plaintiffs question the Administration’s commitment to these enhancements and create a strawman argument where the agencies purport to rely on the two “triggers” in the contingency plan to monitor the effectiveness of the BiOp. NWF Resp. at 12 (“It is not clear why federal defendants believe triggers that allow such dangerous populations declines (from levels that already carry a high level of extinction risk) are adequate as a performance standard to determine whether the 2008 RPA is avoiding jeopardy or requires additional contingency actions.”); *see also* OR Resp. at 21-22 (“Because nothing holds operations to the standard articulated in the BiOp, the new triggers are in effect the only standard. And since they only are triggered after dramatic declines, NOAA’s approach to jeopardy as applied through the AMIP illegally lowers the jeopardy bar.”). This argument is not accurate.

Neither the Early Warning Indicator nor the Significant Decline Trigger correlate to whether the action is likely to jeopardize the species. *See* AMIP at 30-31; *see also* Fed. Defs.’ Resp. at 9. To the contrary, the agencies stated explicitly that it was more than likely the Significant Decline Trigger would never be exceeded during the BiOp’s term. *See* AMIP at 27 n.4 (“The Administration, based on its review of the 2008 BiOp and SCA, does not believe that a

Significant Decline is an expected outcome. Indeed, implementation of the RPA actions should increase the average abundance of each species over time.”). These triggers were developed to provide a safety-net in the unlikely event adult abundance returned to the 1990's levels, with immediate responses that could be implemented quickly; they were not provided to measure whether the mitigation is effective.¹

While the agencies will utilize the existing monitoring capabilities in the BiOp and AMIP to determine whether the abundance thresholds exceed the triggers and would use the existing data to formulate any rapid response or long-term contingency if warranted, the Plaintiffs misapprehend the nature of the Administration’s contingency plan. AMIP at 26. A “contingency plan” is just that – a plan that provides additional insurance if the original plan does not work for some unforeseen or unexpected reason. It is not part of the RPA’s extensive monitoring scheme. *See Ass'n of Irrigated Residents v. EPA*, 423 F.3d 989, 997 (9th Cir. 2005) (discussing statutorily required inclusion of contingency measures in planning documents under the CAA, intended as safeguards should the primary plan elements not succeed as predicted). The agencies took the Court’s guidance to heart and are further refining both short and long-term responses if the need ever arises. AMIP at 33 (“by December 2011, the Action Agencies and NOAA Fisheries will develop a Rapid Response Plan, which will include a detailed description of these potential Rapid Response Actions together with implementation milestones . . .”).

¹ The Plaintiffs spend a great deal of time labeling these triggers as “catastrophic” or portending “disaster”, NWF Resp. at 11, but they completely ignore NOAA’s scientific reasons for setting the triggers at the current levels. *See* AMIP App. 4 at 5-6. As NOAA explained: “While falling to these levels [Significant Decline Trigger] is a cause for concern, they are more precautionary in that they represent species abundance that is at least 3-4 times higher than the abundance if all populations dropped to the 50 fish quasi-extinction threshold.” *Id.* at 6. Its is worth noting that these triggers are set 3 to 4 times higher than the same quasi-extinction threshold Oregon vigorously touted as the appropriate metric for the jeopardy survival inquiry.

Building a contingency plan should be encouraged for a species with a complex life-cycle in environmental planning, but elevating short and long-term contingencies to the status of actual planned actions and the Plaintiffs' expressed desire to immediately implement contingencies actions overlooks the point of the Administration's review: the 2008 BiOp as implemented through the AMIP is fundamentally sound and sufficiently protective of these species. *See* NOAA Letter at 2-3; Action Agency Letter at 2.

Nowhere is this more apparent than the last two years where this region has experienced a number of record returns among these listed stocks. For example, even though the Nez Perce Tribe was critical of the agencies' efforts on Snake River sockeye, they do not deny (or even address) that for the last two years this stock has exceeded all expectations.² Like sockeye, steelhead this year saw the largest return on record since 1975.³ The State of Idaho again opened a Snake River fall Chinook fishery for the second time in thirty years.⁴ But perhaps most promising are the jack counts that have surpassed all expectations – nearly *four* times the previous record – hopefully indicating that we will again see record returns for years to come.⁵ The point here is not that we can rest on these accomplishments, but that the Plaintiffs' assertions that these stocks “are at imminent risk of extinction” and therefore the actions in the contingency plan should be immediately implemented, are at odds with the facts. NWF Resp. at 3.

In short, the predictions in the BiOp with the added precautionary measures in the AMIP

² 833 returned to the Sawtooth Valley.

³ Columbia River DART, Data as of 10/21/2009.

⁴ <http://fishandgame.idaho.gov/apps/releases/view.cfm?NewsID=5044>

⁵ Columbia River DART, Data as of 10/21/2009.

are sound and the BiOp and AMIP RM&E will monitor the effectiveness of the mitigation, but if something unexpected does occur, there is now an insurance plan for any contingency. Those are the two distinct purposes of the AMIP.

B. The Measures in the BiOp and AMIP Are Reasonably Certain to Occur and Evidence This Administration's Commitment to the 13 Listed ESUs.

In criticizing the Administrations' review and the AMIP, the Plaintiffs argue that the AMIP is not sufficiently detailed, does not ensure survival benefits, and suggest that hydropower ("hydro") operational modifications will provide "guaranteed" results. As explained below, Plaintiffs' reading of the applicable law is incorrect and their factual assertions are misplaced.

It is notable that although the Plaintiffs spend a great deal of time arguing that the habitat mitigation and provisions in the AMIP are not sufficiently detailed and therefore not reasonably certain to occur, they overlook Ninth Circuit case law that has actually dealt with this issue. In *Southwest Center v. BOR*, 143 F.3d 515, 518 (9th Cir.1998) ("*Lake Mead*") the Ninth Circuit found that a generalized commitment to protect 1400 acres as mitigation for the operation of Lake Mead dam, without any particular location, project specificity, or time frame, was reasonably certain to occur and sufficiently detailed as an RPA under Section 7(a)(2) of the ESA. *Id.* The Plaintiffs do not address this binding precedent and instead, rely on district court cases that are factually distinct from the FCRPS RPA, Fish Accords, and AMIP. *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007) ("The existing DSRAM process provides *absolutely no* certainty that any needed smelt protection *actions* will be taken at any time") (emphasis in original); *see also Center for Biological Diversity v. Rumsfeld*, 198 F. Supp 2d. 1139, 1153 (D. Ariz. 2002) (court finding the RPA deficient because the unspecified plan had only a "somewhat substantive commitment . . . to reduce net water use by 600 acre feet"). In likening the AMIP to the inadequate adaptive management plans in *Kempthorne* and

Rumsfeld, the Plaintiffs overlook the fact that the AMIP does not exist in a vacuum.⁶ To the contrary, the AMIP is a further refinement of the 2008 BiOp's RPA and "was developed to infuse the implementation of the 2008 RPA with the best science currently available." AMIP at 7. It is an implementation plan that "makes full use of the adaptive management provisions of the RPA" AMIP at 8. As such, it is the BiOp with the additional specificity of the AMIP that is at issue here.⁷ Under the Ninth Circuit's standard in *Lake Mead*, there is no question that the suite of actions in the BiOp and AMIP satisfy and, indeed, far exceed current binding precedent.

The Plaintiffs' latest theory also seems to suggest that in order for mitigation to be relied upon, whether it is a specific action in the RPA or an enhancement in the AMIP, the survival benefit must be guaranteed before NOAA can reasonably include this mitigation in its analysis. OR Resp. at 9 n.6 ("they plan to rely on predictions rather than verified results."). The 2008

⁶ In *Kemphorne* the agencies relied entirely on an adaptive management process that had "no quantified objectives or required mitigation measures." 506 F. Supp. 2d at 355. The Court found the BiOp's sole reliance on an adaptive management plan arbitrary because "[a]lthough the *process* must be implemented by holding meetings and making recommendations, nothing requires that any *actions* ever be taken." *Id.* (emphasis in original). This is akin to a situation where there is no mitigation at all in the FCRPS BiOp and only a process commitment to meet within the RIOG. As explained below, this is certainly not the case with this BiOp. *See infra* at 17-22. Moreover, the AMIP contains much more than a stated intent to meet within RIOG. It has actions, with hard-wired deadlines. *See* AMIP at 16 (Estuary MOA); *id.* at 17 (predator control and invasive species actions); *id.* at 18-19 (spill); *id.* at 20-25 (enhanced RM&E costign approximately an additional \$6 million per year). And it has a contingency plan with a readily identifiable Significant Decline Trigger that if exceeded would require implementation of Rapid Response actions and potentially long-term contingencies. AMIP at 32-38.

⁷ NWF also provides the court with a new case from the District of Montana that involved a delisting decision under Section 4 of the ESA. NWF at 10 n.9. While the factual and legal differences are clearly observable and need no further elaboration, it is worth noting that NWF actively litigated on behalf of the Federal Defendants in that case and quite strongly took the position that the mitigation plan was more than adequate under Section 4 of the ESA. It is unclear why NWF has taken an inconsistent position in this litigation.

BiOp, even with the AMIP, is not a guarantee. It is a prediction for the future and while the AMIP will no doubt aid in implementing the RPA in a precautionary manner, the proposed level of certainty that Plaintiffs seek far exceeds any case law or regulatory requirement. *See e.g., In re Operation of Missouri River System Litigation*, 421 F.3d 618, 635 (8th Cir. 2005) (rejecting claim that lack of evidence that proposed mitigation measures will work violates Section 7 and citing with approval continued monitoring and adaptive management of mitigation measures); *Northwest Ecosystem Alliance*, 475 F.3d 136, 1147 (9th Cir. 2007) (NMFS “may not ignore evidence simply because it falls short of absolute scientific certainty”); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992) (finding the consultation reasonable even though there was admitted uncertainty). The statutory language of “likely” within Section 7(a)(2) indicating a probability confirms Congress’ intent that a BiOp is a prediction, it is not a survival benefit guarantee as Plaintiffs suggest. 16 U.S.C. § 1536(a)(2); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))). Moreover, the use of off-site mitigation as a mechanism to address adverse effects is settled law in the Ninth Circuit. *See Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 955-57 (9th Cir. 2003); *Lake Mead*, 143 F. 3d at 518. Although the AMIP gives more certainty that the measures in the BiOp will be implemented in a precautionary manner, the Administration’s choice to bolster the 2008 FCRPS BiOp through the adaptive management mechanism, as the Court requested, does not change the legal standard.

Finally, the Plaintiffs strongly question this Administration’s commitment to the enhanced and accelerated measures in the AMIP. NPT Resp. at 21 (“The AMIP makes sweeping

assertions . . . but does not actually describe any specific work or provide commitments and assurances that funding and resources are available to carry out this work.”). Significant time and care were given to the development of the AMIP. AMIP App. 1 at 3-4. Many of the provisions caused considerable internal debate, but when this debate concluded, the Administration expressly committed to all of the enhancements, accelerations, and contingency plan in that document. *See* NOAA Letter at 2 (“NOAA is fully committed to carrying out those activities identified in the Plan for NOAA implementation.”); *see also* Action Agency Letter at 3 (“Through the AMIP, which we, the undersigned [Jo-Ellen Darcy, Assistant Secretary of the Army, Laura Davis, Associate Deputy Secretary Department of Interior, Stephen J. Wright, BPA, Department of Energy] representing our Cabinet level agencies approve, the Action Agencies commit to implement the specified activities and processes to ensure that the benefits of the RPA will be achieved.”). The law is clear on this point - an agency is entitled to a presumption that it will implement the actions it said it would. *FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (noting “the presumption to which administrative agencies are entitled-that they will act properly and according to law.”); *Sullivan v. Everhart*, 494 U.S. 83, 94 (1990) (“Respondents’ fear of intentional manipulation of the netting period can be entirely dismissed if this provision is observed in good faith-as we must presume, in this facial challenge, it will be.”). Moreover, demands for identified funding sources with three agencies that are subject to appropriations are unrealistic. The Plaintiffs’ concerns that the Administration has not fully committed to the AMIP are unwarranted.

1. The Plaintiffs Do Not Explain How Their Proffered Spill Operations or Lower Snake Dam Breaching Measures Could Satisfy Their “Reasonably Certain to Occur” Standard.

Despite the adjustments the Administration made in response to the Court’s concerns on

spill – where there is no longer a presumptive spring spill/transport operation and a commitment to develop a summer spill safeguard – the Plaintiffs continue to insist on a rigid spill operation precluding modification to accommodate new data. *Compare* NWF Resp. at 17-18, *with* AMIP App. 1 at 20. There is no scientific literature or data that supports the Plaintiffs’ 24/7 gas cap spill regime. In fact, it runs counter to the recent ISAB report on spill and transport. *See* Peters MSJ Reply. Dec. ¶¶ 3-10; Graves MSJ Rep. Decl. ¶¶ 3-6. Yet, without a demonstrable or identifiable quantitative benefit to their rigid operation, the Plaintiffs ask this Court to assume that a 24/7 gas cap spill will not harm Snake River steelhead. This assumption is far different from the “guaranteed” standard they seek for every other mitigation action in the BiOp.

The Agencies are not prepared, nor are they permitted, to gamble with Snake River steelhead. The issue of spring spill was fully vetted through the collaboration and now the Administration’s review process, and the end result was an adherence to the best available data within each year. AMIP App. 1 at 21. The FCRPS system is dynamic and our understanding of how juveniles migrate during the spring and respond to transport improves every year, if not more. *Id.* Evaluating ever emerging data and adapting to this new information are the principles that the Administration is committed to following as illustrated in the AMIP. In contrast, Oregon and the Nez Perce Tribe have not provided any explanation as to why they are unwilling to follow the recommendations of the RIOG, and now the Administration’s commitment to analyze spring spill and transport each year within the RIOG process. AMIP at 18.

Plaintiffs’ contentions regarding summer spill are similarly unfounded. Snake River fall Chinook is an ESU that is exceeding all expectations. Indeed, Figure 1 in Oregon’s response demonstrates the dramatic increase in abundance over the years. OR Resp. at 19. Studies have definitively shown that yearling fall Chinook (those that overwinter within the system) are much

more likely to return as adults than sub-yearling fall Chinook. FCRPS Issue Summary at 13-17. Moreover, as climate change makes carbon neutral energy sources even more important, keying a spill operation to the presence of fish, rather than a firm date, is eminently reasonable, both from a biological and climate change perspective. And now the Administration has committed to developing a safeguard that would continue spill through August 31, if the safeguard is exceeded. AMIP at 19. Notably, NWF plaintiffs appear to assume that Snake River fall Chinook will continue to increase in abundance and the safeguard will never be implemented. NWF Resp. at 18 (“it is certainly not a commitment to continue summer spill through August 31 each year.”).⁸ In the absence of meaningful, contrary data, the operation as provided in the AMIP is entirely reasonable.

The Plaintiffs ask the Court to make similar unsupported assumption with respect to the question of dam breaching. *See* NPT Resp. at 25 (characterizing dam breaching as a “feasible biological option”). Lower Snake river dam breaching, however, is not reasonably certain to occur. Putting aside the important issue of whether there would be a net-biological benefit from breaching or whether it is necessary to avoid jeopardy, this type of action, in contravention of existing congressionally authorized project purposes, would require extensive study and then Congressional authorization and appropriations. Before Congress will consider a change in authorized project purposes, as would be the case for breaching federal dams, it requires substantial study to support and justify that change. Inclusion and reliance of an action that requires Congress passing future legislation is not a permissible action for the BiOp – it is not

⁸ In their brief, it appears that Oregon agrees that a biological trigger for the cessation of spill is reasonable. OR Resp. at 34 (“August spill should not be reduced until approximately 99% of the wild juvenile migrants have passed the dams.”). Technical disputes regarding which percentage to use as a biological trigger is inherently a scientific issue where deference to NOAA is particularly warranted. *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Ci. 2009).

“reasonably certain to occur” – nor does the Nez Perce Tribe explain how it could be. That is why this was properly considered as a long-term contingency action within the AMIP. AMIP at 36-39.

Like their proposed spill operation, the Nez Perce Tribe believes that lower Snake river dam breaching should have been included “as the best biological alternative for rebuilding the Snake River salmon and steelhead runs” NPT Resp. at 27. There is no data to support this assessment. In fact, the current literature and Administration’s review suggested the opposite. AMIP at 36-37.⁹ There may be a net-biological benefit to lower Snake river dam breaching and NOAA is in the process of expanding its life-cycle model to assess some of the underlying questions. AMIP at 38 (“By December 2012, NOAA Fisheries, in coordination with the Action Agencies will develop the component of the life-cycle model . . .for evaluation of the short-term, transitional and long-term biological effects of dam breaching.”). The Corps study plan, to be completed by March 2010, will also identify questions to be addressed if this contingency action is triggered. AMIP at 37. Until the science indicates this action is necessary to avoid the likelihood of jeopardizing the affected ESU’s and that breaching the lower Snake River dams will accomplish this objective, the Nez Perce Tribe is assuming a “guaranteed” benefit from an action that is far from reasonably certain to occur.

The Plaintiffs’ unsupported hydro assumptions stand in stark contrast with the tributary and estuary habitat methodologies that were painstakingly developed over the course of years in the collaboration. As discussed previously, each of the methodologies was subjected to extensive scientific review, and at times criticisms that were ultimately rectified. NOAA Supp.

⁹ See Corps AR 05714 at 110566-110567 (*Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement, Executive Summary*).

AR 77. Similarly, The AMIP addresses spring and summer spill with science based operations that evidence a commitment to sound adaptive management and this Administration has provided lower Snake river dam breaching as a contingency “if all other measures fail” May 18, 2009 Letter to Counsel at 3. While Plaintiffs are dissatisfied with these operations, they have not presented data that would alter the Administration’s conclusions.

2. NOAA is Not Required to Guarantee a Survival Benefit for Habitat Mitigation.

Under Plaintiffs’ formulation of a “proper” habitat analysis, NOAA is required to calculate the exact survival benefits (presumably to juveniles and adults) from a project description that includes the time frame for completion and specifies precisely how each limiting factor is addressed. Then, only after the project is defined and this calculation is made, can NOAA include the habitat project within a Section 7(a)(2) consultation. NWF Resp. at 19; OR Resp. at 12.¹⁰ According to Plaintiffs, unless NOAA can guarantee the survival benefit of every project, even an unquestioned commitment to complete important habitat work backed by secured funding is not “reasonably certain to occur” and therefore NOAA cannot rely on these actions in the BiOp. This is an impossible standard and one that is at odds with Ninth Circuit law. *See Selkirk Conservation Alliance*, 336 F.3d at 957 (“The agencies performed a credible task: they identified the most troublesome problems (roads and harvesting in sensitive areas), realized the magnitude of those problems, and then determined that mitigation measures

¹⁰ The Nez Perce Tribe once again does not take issue with the habitat methodology or that projects must be refined or replaced because of real-world obstacles, but reiterates that unless the Nez Perce projects described in the Declaration of Emmitt E. Taylor are included in the BiOp, the BiOp is not sound. *See* NPT Resp. at 13 (“[the Tribe] identified everything that could be implemented during a 10 year time frame within the geographical area where the Tribe works”); *id.* at 14 (“The Tribe has previously emphasized that while continued refinement of the habitat projects as they are implemented is laudable. . . .”).

contained in the Conservation Agreement would lower the threats to the grizzlies *enough* that the Stimson Project would not place the existence of the species in jeopardy.”) (emphasis in original); *Lake Mead*, 143 F. 3d at 518. Nor do the district court cases the Plaintiffs cite stand for this proposition. *See Kempthorne*, 506 F. Supp. 2d at 357-58 (rejecting plaintiffs’ reasonably certain to occur argument and noting: “A Court must leave to the agency the application of its expertise and authority to manage the complex hydrologic, legal, financial, physical, and logistical aspects of protecting the delta smelt.”) *see also Rumsfeld*, 198 F. Supp. 2d at 1150 (citing with approval a draft RPA that “included only a list of measures the Army had to consider in its quest to balance water use . . .”). At bottom the issue presented is whether habitat mitigation (largely done through the Fish Accords) can mitigate for the effects of the hydro system, or whether only hydro actions can mitigate for hydro effects. Accepting the Plaintiffs’ proposed standard calls into question the fundamental and legally valid premise that off-site habitat can mitigate for the adverse effects of an agency action, and would mean that this region would need to move in a new direction rejecting the regional collaboration, much of what is in the Columbia Basin Fish Accord, and in effect, starting this process over.

a. The Plaintiffs Fail to Understand the Significance of the New Habitat and Intensively Monitored Watershed RM&E in the Tributaries.

The Plaintiffs spend a considerable amount of time advancing their new proposed standard with respect to tributary habitat, but they do not address how the AMIP’s enhanced RM&E will monitor the effectiveness of this mitigation. As explained below, the existing and enhanced RM&E in the BiOp and AMIP ensure the effectiveness of the tributary habitat mitigation in the RPA and Fish Accords. Instead of addressing the enhanced monitoring, the Plaintiffs focus on the spreadsheets of existing and newly developed habitat projects (that were

provided in response to the Court's May 18, 2009, request) and note that some of the projects are continued in subsequent years. Likewise, the Plaintiffs' references to the Fish Accords and how nearly \$1 billion of habitat mitigation "may" be beneficial, NWF Resp. at 22 n.16, are not persuasive.

The AMIP provides enhanced monitoring in three key areas for tributary mitigation. *See* AMIP at 24. The first, habitat status and trend monitoring when coupled with the adult and juvenile trend monitoring, will "allow the agencies to assess fish survival and habitat productivity improvements" *Id.* By December 2011, this enhanced monitoring will be expanded to cover one population or watershed for each major population group within ESUs. *Id.* The Administration's review recognized that there was some uncertainty as to whether these habitat projects would have their intended survival benefits, and that is why the Administration decided to enhance these monitoring efforts. AMIP App. 1 at 4. If the habitat projects are not addressing the limiting factors the expert panels identified, then the existing and enhanced habitat monitoring will directly assess that survival change and the agencies, with the aid of expert panels, will make the necessary change. AMIP at 24.

The second key enhancement, additional intensively monitored watersheds ("IMW"), is complimentary to habitat status monitoring, but even more responsive to the Court's concerns regarding the survival benefits that will be achieved. AMIP at 24 ("An IMW is a formal cause and effect experiment designed to clarify the connections between restoration actions and the fresh-water survival of salmonids."). As specified in the RPA actions 56 and 57, a number of watersheds throughout the Columbia and Snake river basins will be intensively monitored and this data will be used to inform future or replacement project selection. *Id.* Oregon takes issue both with the existing IMWs and the enhancements and prioritization of BPA funding in the

AMIP because there are difficulties with implementation due to the need for long-term controls. OR Resp. at 16 (*citing* FCRPS BA B.2.6-3-5). But notably Oregon does not contest the more fundamental and important fact that IMWs are the best way to monitor population level productivity and are unquestionably the best available science for monitoring the survival benefits of habitat improvement projects. *Id.* at 15 (“IMWs . . . which the [BA] recognizes as the best available science for assessing the survival benefits that are attributable to habitat mitigation.”). It is unclear how Oregon maintains the position that NOAA lacks the capacity to monitor the survival benefits, while simultaneously acknowledging that it has used the best available science for monitoring survival benefits. *Id.* The ESA does not demand perfection, only that the best science is used. *Northwest Ecosystem Alliance*, 475 F.3d at 1147

Third, all of these habitat actions will be monitored through the most important metric: juvenile and adult survival. *See* AMIP at 23-24. The AMIP’s adult and juvenile status and trend monitoring enhances the existing fish monitoring data by expanding adult monitoring to populations not presently being monitored and by implementing entirely new monitoring of juvenile production at the watershed level. *See e.g.*, BiOp at 8.3-47, Table 8.3.2-1 (abundance for ESU populations). With regard to juveniles, this means that by December 2011 the Action Agencies will “ensure that at least one population per MPG is being monitored” AMIP at 24. Tributary habitat is extremely important during the juvenile lifecycle stage for rearing and this particular monitoring will be sensitive enough to detect “downturns in natural freshwater production and juvenile survival” *Id.* at 24. Collectively, all of the existing monitoring and the enhanced RM&E will allow NOAA and the Action Agencies to effectively monitor whether this massive suite of tributary mitigation is attaining the desired survival benefits. *Id.* Perhaps more than any other aspect of this BiOp, the tributary habitat methodology in combination with

the enhancements under the AMIP is one of the most sophisticated, and regionally accepted forms of assessing the benefits of off-site habitat mitigation. This constitutes the best available science and the Court should defer to NOAA's and the sovereign scientists' expertise.

The Plaintiffs also incorrectly suggest that some of these habitat projects are falling behind schedule because the same project number was included in multiple years. NWF Resp. at 22. The Action Agencies have a long history of funding habitat improvement projects that continue to implement new on-the-ground actions from year to year.¹¹ In many cases these projects take multiple years to complete and retaining the same project description (which is really more accurately a program) allows the agencies to expedite implementation, rather than creating duplicative additional contracts for each action.¹² Although the project number and title may remain the same, new sub-contracts detailing new habitat improvements which result in new metrics (e.g. miles of stream improved, additional cfs of water secured, etc) are negotiated annually. *Id.* The Plaintiffs' suggestion that this efficiency somehow reflects that habitat projects are not being implemented further underscores why the Court should defer to the agencies and the Northwest Power and Conservation Council that understand how these processes actually work.

As just one example, the Plaintiffs again take issue with habitat projects in the

¹¹ *See*, http://www.salmonrecovery.gov/Biological_opinions/FCRPS/biop_implementation/2005.cfm (2000-2005 progress reports); *see also*, <http://www.nwcouncil.org/about/budgets.htm> (2001-2008 fish and wildlife expenditures)

¹² *See*, <http://www.cbfish.org/reports/ReportViewer.aspx?RptName=WorkCategoryBudgetSummary&rs:Format=PDF>; *see also*, <http://pisces.bpa.gov/release/reports/ReportViewer.aspx?RptName=ContractsByFilter&rs%3aFormat=PDF>

Pahsimeroi basin, incorrectly suggesting that the projects are not addressing the limiting factors (namely flow). NWF Resp. at 27-28. As explained previously, the Pahsimeroi is an extremely degraded watershed that has enormous amount of potential benefit; in particular, a number of the tributaries are significantly de-watered or blocked for irrigation purposes thereby denying this population spawning and rearing habitat. 2008 Declaration of Kim W Kratz , Oct. 24, 2008 at ¶¶ 9 -10; 2008 Reply Declaration of Kim W. Kratz at ¶ 17. Recently, the agencies, in partnership with other entities, just completed the “P-9 Project Primary Reach.” *See* Fed. Defs.’ Ex. 2 (table providing a sub-set of projects details for the Pahsimeroi). This project was responsible for removing two ditches along the Pahsimeroi and opening up Big Springs Creek to important cool-water spawning and rearing habitat. *See* Fed. Defs.’ Ex. 3 (before diagram) and Fed. Defs.’ 4 (after diagram). In addition, the Agencies secured instream water rights to provide flow to these reconnected areas. This increased the volume of flow from approximately 2-5 cfs to 30-40 cfs. *Id.* Putting this in Plaintiffs’ terms, this is well over a 100% increase in flow, but more importantly, a recent survey revealed approximately 69 salmon redds where there had been 2 the previous year. Fed. Defs.’ Ex. 2

Finally, the Plaintiffs again profess not to object to the Fish Accords, but at the same time question their value and ask the Court to remove the underlying foundation – the use of tributary habitat restoration as offsite mitigation for hydrosystem impacts. *See* NWF Resp. at 22 n.16 (“Our point is not to object to the MOAs but to point out the disconnect between these and [sic] a legally adequate jeopardy analysis.”). The FCRPS, Upper Snake and *United States v. Oregon* BiOps, rely on the Fish Accords and the large amounts of habitat mitigation contained in those agreements to support NOAA’s conclusion that these actions are not likely to jeopardize the listed ESUs. SCA at 11-6. The Plaintiffs’ novel habitat standard would require the confirmation

of survival benefit of a yet-to-be-completed habitat project before that project could be relied on in a BiOp. Such standard would reach well beyond “the best available scientific information” and strikes at the very nature of these agreements. When these agreements were negotiated, the tributary habitat methodology was used as the underlying currency for the scope, magnitude, and worth of the agreements. Because each project, indeed each correction of a limiting factor, will respond and produce varying levels of survival benefits, NOAA and the Action Agencies, with the aid of this entire region, created one of the most sophisticated tributary habitat methodologies for assessing projects and their expected survival benefits, which has now been evaluated and confirmed by this Administration. AMIP App. 1 at 11-12. The Plaintiffs cannot support the Fish Accords, but simultaneously strike at the very methodology that underlies the habitat mitigation in all of those agreements. AR Corps 003672 at 005414 (“The method conforms to the “Hillman method” which is in use by the action agencies.”). The Fish Accords support the FCRPS, Upper Snake, and *United States v. Oregon* BiOps, which are premised on the Ninth Circuit’s recognition that off-site habitat may be used to mitigate for the adverse effects of an action. *Selkirk Alliance*, 336 F.3d at 955; *Lake Mead*, 143 F.3d at 518. But, if this Court decides that the Plaintiffs are correct in their assertions that survival benefits must be guaranteed with project level descriptions in advance of multi-year implementation, the foundation of these agreements with the FCRPS BiOp will be called into question. Indeed, if projects truly have no ESA benefits, as Plaintiffs’ claim, then the Federal Government’s incentive to pursue habitat mitigation with the attendant commitments in the BiOp and the AMIP is significantly diminished.

b. The Proposed Estuary Methodology is Sound.

The Plaintiffs again re-iterate their points regarding NOAA’s estuary methodology and

attempt to minimize the significance of the Washington Estuary Memorandum of Agreement (“Estuary MOA”). NWF Resp. at 20 (“The AMIP provides no new funding for tributary or estuary habitat actions . . .”). As indicated in the AMIP, the Estuary MOA was signed among the Corps, BPA, Reclamation, the Washington Department of Fish and Wildlife, and the Governor of the State of Washington on September 16, 2009. This will provide an extra \$40.5 million to accelerate the attainment of benefits in estuary. AMIP at 16. This secured funding and the willing participation of the State of Washington to facilitate many of these projects will ensure that the commitments in the BiOP are achieved. *Id.*

The Plaintiffs contend that the Estuary MOA utilizes the same methodology as the BiOp. They are correct. The estuary methodology is an issue that the Administration reviewed critically in light of the Court’s May 18, 2009, letter, and took great care in deciding. *See* AMIP App. 1 at 7 (“The Administration has reviewed the methods used to estimate survival benefits from habitat projects and believes they are sound and retain the needed flexibility to respond to evolving scientific data, as well as to implementation challenges and opportunities.”). The Science Center’s critique of the estuary module and Plaintiffs’ legal extrapolations were fully understood by the Administration, and ultimately the review found NOAA’s response reasonable and the Plaintiffs’ legal arguments lacking merit. AMIP App. 1 at 9-10 (“The module was instead a synthesis of the best available science incorporating three secondary sources of information(each of which contained primary literature sources). This term of art ‘scientific document’ refers to the nature of the source cited, but has been understandably misinterpreted by many to be a criticism of the scientific validity of the module.”). The estuary methodology, while not perfect, is unquestionably the best available science and that is why it utilized in the Estuary MOA. Federal Defendants have extensively explained the use of this methodology

throughout this case, *see* Fed. Defs.' MSJ at 58-62, Fed. Defs.' MSJ Reply at 30, and the Administration review process closely examined this issue, AMIP App. 1 at 8-11, those explanations need not be repeated again here.

3. The Plaintiffs' Position on Flow is Premised on a Number of Inaccurate Arguments.

As this Court knows, the FCRPS system is constrained by the amount of water it can store for flow augmentation. The Plaintiffs assert that the agencies' management of storage for flow augmentation should have been altered by the Administration. This is premised on a number of misplaced arguments.

The goal of the flow augmentation program is to increase fish survival by increasing flows during key periods to reduce juvenile fish travel times, either to the sea or points of collection and transport. Substantial improvements in system operations and configuration have been established since 1995 that reduce juvenile fish travel times and increase fish survival. Flow augmentation is only one tool being applied to this effort. NOAA considered the likely effects of these changes in the flow augmentation program in developing its analysis of effects and its conclusions and Administration supports these conclusions. AMIP App. 1 at 18-20.

Oregon argues that the 2008 BiOp would reduce overall flow augmentation by between 552 and 1006 kaf each year. OR Resp. at 31 (*citing* Bowles Prel. Inj. Decl. ¶ 18).¹³ This assertion is misleading. The amount of spring flow augmentation has not been reduced under the 2008 BiOp. SCA at 8-11 through 8-14; *see also* 2008 Declaration of Ritchie Graves ¶ 13. With regard to summer flow augmentation, in the driest years (the lowest 20% of water years), there

¹³ Because the Court stayed the Plaintiffs' motion for preliminary injunction last year, Federal Defendants did not have an opportunity to respond to the errors in Oregon's preliminary injunction declaration.

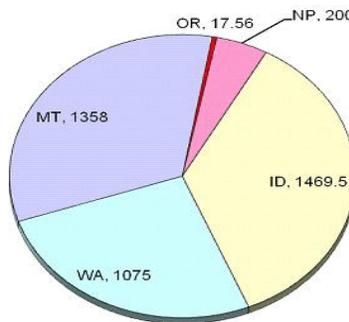
will be an increase of 60 kaf above the 2000 BiOp while in the wettest years (the highest 20% of water years), there is a reduction in the amount of flow augmentation by the end of August. This is because that water is shaped for release in September, in part because the Nez Perce Tribe requested this operational change under the Upper Snake agreement to provide cool water for returning steelhead and chinook. Corps AR 04979 at 089730-089750; BA at B.1-5-(15-16) and B.2.1-3. In the wettest of years, the region has decided to shift the timing of delivery to benefit, in part, returning adults. Putting aside the dry years where there is an increase in summer flow augmentation, the remaining decrease in summer flow augmentation is primarily the result of the “Montana operations” and the Nez Perce’s adult flow augmentation out of Dworshak. The Court is intimately familiar with the Montana operations which the ISAB found has no measurable effect of salmon and steelhead. *See* Independent Science Advisory Board (ISAB), 2004 (Findings from the Reservoir Operations/Flow Survival Symposium); *see also* ISAB Report 2004-2, Portland, Oregon (Dec. 10, 2004); BiOp Issue Summary 9-11. These are among some of the reasons that the Administration concluded that additional flow was unwarranted. AMIP App. 1 at 18-20.

Oregon also touts the new study from the NOAA Science Center (Scheuerell *et al.* 2009) but does not provide a complete picture. OR Resp. at 32. All of the data (or more accurately the algorithms) that were compiled and published in this study were previously incorporated into the COMPASS model during the remand, which means that all of this information was part of NOAA’s decisionmaking process and supports the conclusions that were made in the BiOp. NOAA AR B.367. More broadly, Oregon misses the point of the study – earlier juvenile arrival timing to below Bonneville Dam increases the proportion of fish that successfully return as adults. *See* Scheuerell *et al.*, *Relating Juvenile Migration Timing and Survival to Adulthood in*

Two Species of Threatened Pacific Salmon, 2009. While it is true that water velocity could be increased with additional flow, it is equally true that the fastest way to get fish to the estuary and ensure timely delivery is through transport. See Fed. Defs.’ Opp’n Pls.’ Mot for 2006 Preliminary Injunction at 12 (arguing for speeding the delivery of steelhead to the estuary through the use of transport); see also Declaration of John Williams at ¶¶ 8, 11, 24. NOAA and the Action Agencies will be examining this study, as they would with any new information, and will do so through the collaborative process in RIOG to determine if any management changes are warranted.

It is notable that the Nez Perce Tribe’s brief is silent on the issue of flow while the State of Oregon pursues its quest for even more water. This is understandable considering how much Oregon actually contributes to flow augmentation:

Flow Augmentation Water Provided by Sovereign in Kaf



Other sovereigns have taken a very active role in securing water for salmon and steelhead, for

example the State of Idaho amend their water code through state legislation so that BOR can deliver up to 487 kaf for flow augmentation, Corps AR 04979 at 089730-089750, and the State of Montana sends water at the expense of their own resident and listed species. *See* BiOp Issue Summary at 9-11. The Nez Perce Tribe holds 200 kaf in Dworshak for fish purposes, and is involved in providing flow augmentation – albeit largely in September. Corps AR 04979 at 089730-089750. Similar actions, however, have not been taken by Oregon.

In sum, the FCRPS system is marked by limited capacity to store and manage the massive amount of water in this region while balancing flood control and flow augmentation that is released in the spring run-off. This water needs to be carefully managed, and NOAA’s decisions regarding flow are reasonable. This has been confirmed by this Administration’s review. AMIP App. 1 at 18

II. ADEQUATE POTENTIAL FOR RECOVERY IS A REASONABLE JEOPARDY STANDARD AND NOAA’S APPLICATION OF THAT STANDARD SHOULD BE AFFORDED DEFERENCE.

The Federal Defendants are in agreement with Plaintiffs on at least one point with regard to the jeopardy standard used by NOAA – there is no new jeopardy standard in the AMIP. NWF Resp. at 5; *see also id.* at 5 n.5 (“the AMIP is not a new agency action, analysis, or decision.”). As explained in our previous filing, the Administration spent a great deal of time examining the legal standard and the Plaintiffs’ assertion that the analysis in the BiOp does not properly address recovery prong of the jeopardy standard for these 13 ESUs.¹⁴ After this review (which included carefully listening to the Plaintiffs about their theories on how to conduct a jeopardy analysis), the Administration concluded that the FCRPS BiOp employed a correct interpretation of the jeopardy standard by looking for survival with an adequate potential for recovery and that the

¹⁴ The use of “ESU” throughout this reply refers to “DPSs” as well.

RPA as implemented through the AMIP satisfies the Ninth Circuit standard. Fed. Defs.’ Resp. at 21. Instead of acknowledging this conclusion, the Plaintiffs attempt to manufacture confusion by again distorting the jeopardy standard. Plaintiffs’ argument is wrong both factually and legally.

As defined by regulation, the statutory phrase “jeopardize the continued existence of” means “to reduce appreciably the likelihood [i.e., the probabilities] of both the survival and recovery of a listed species in the wild” 50 C.F.R. § 402.02. Thus, Section 7(a)(2) requires a federal agency to ensure that actions carried out are not likely to “reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.” *Id.* This is the jeopardy standard. It does not require an action agency to recover a listed species, or even to increase or improve the probabilities for a species’ survival and recovery. It only requires that it ensures its actions are not likely to *reduce appreciably* those probabilities. The BiOp’s RPA as implemented through the AMIP, contains massive amounts of mitigation that increase the likelihood of the survival and recovery of all 13 species. The jeopardy standard is being met. The Plaintiffs, however, fail to even acknowledge the “reduce appreciably” aspect of the jeopardy standard. Rather, they seize on the recovery prong of that standard and ignore the context in which it is set forth within the regulatory definition of the phrase “jeopardize the continued existence of.”

Furthermore, as a factual matter, the Plaintiffs are wrong that “trend towards recovery” is the legal standard for the recovery prong of the jeopardy standard. NWF Resp. at 4. It is a factual finding that is just one indicator of compliance with the legal standard for the recovery prong, i.e., “adequate potential for recovery.” In the very first chapter of the 2008 FCRPS BiOp, NOAA clearly enumerates the survival and recovery prongs of the jeopardy standard that is applied to all of the ESUs:

(a) whether the species can be expected to survive with *an adequate potential for recovery* (e.g. trending towards recovery) under the effects of the action, the effects of the environmental baseline, and any cumulative effects

BiOp at 1-10 (emphasis added). In further explaining this legal standard, NOAA states “in some clearly articulated circumstances . . . where limiting factors are reduced or protective mechanisms are implemented, as with safety net hatcheries, to position the species for eventual progress to recovery.” BiOp at 1-12 to 1-13 (emphasis added). Demonstrating a trend is not required to meet the legal benchmark and other factors can lead to a conclusion that the action allows for an “adequate potential for recovery.” BiOp at 1-10.

This distinction is best illustrated by the fact that there are several ESU conclusions within the BiOp that only found that there was an adequate potential for recovery, not that the ESUs were trending towards recovery. *Compare* BiOp at 8.2-26 (Snake River Fall Chinook: “the survival changes resulting from the Prospective Actions and other continuing actions in the environmental baseline and cumulative effects will ensure a level of improvement that results in the ESU being on a trend towards recovery.”), *with* BiOp at 8.10-52 (Lower Columbia Chinook: “NOAA Fisheries determines that the RPA will address the influence of the Action Agencies’ projects on the Lower Columbia River Chinook salmon ESU, thereby contributing to its survival with an adequate potential for recovery and will not cause deterioration in the pre-action condition for the species.”); *see also* BiOp at 8.9-24 (Columbia River Chum: “The Action Agencies’ prospective hydrosystem operation and estuary habitat improvements, by addressing the influence of their projects, will contribute to the viability of this ESU and thus to its survival with an adequate potential for recovery.”). Indeed, because of data availability, a factual finding of “trend towards recovery” was made with respect to only six ESUs out of a total of thirteen. *See e.g.* BiOp at 8.2-26 (Snake River fall Chinook); *id.* at 8.3 -39 (Snake River spring/summer

Chinook); *id.* at 8.5-46 (Snake River steelhead); *id.* at 8.6-27 (Upper Columbia spring Chinook); *id.* at 8.7-36 (Upper Columbia steelhead); *id.* at 8.8-41 (Mid-Columbia steelhead). The use of the legal standard articulated by the Ninth Circuit is further underscored by the fact that “trending towards recovery” is never mentioned in *any* of the final conclusion paragraphs for each ESU. *See e.g.* BiOp at 8.2-32 (Snake River fall Chinook); *see also id.* BiOp 8.9-25 (Columbia River chum). The Plaintiffs know that seven of the ESUs never mention the words “trend towards recovery” because there was inadequate data to make such a factual finding.

Moreover, while not required, NOAA did consider and analyze what recovery looked like and the analyses were keyed to the actual recovery needs of the listed species. For each ESU where the Interior Columbia Technical Recovery Team (“ICTRT”) made a determination as to the specific abundance levels required for recovery, that benchmark was expressly included in the BiOp. *See e.g.* BiOp at 8.2-33 (Table 8.2.2-1 providing “ICTRT Recovery Abundance Threshold” of 3000 for SR fall Chinook). This benchmark was used, in part, to calculate how much change was required to achieve the recovery goal under varying viability thresholds. *See* SCA Appendix B at 4 (Aggregate Analysis Appendix) (second page of Table 1 referencing the “adjusted ICTRT gap” at 25%, 5%, and 1% criteria); *see also id.* at 50-60 (graphically illustrating the amount of change required to achieve TRT thresholds).¹⁵ NOAA spent a great deal of time and effort figuring out how much more change, after implementation of the BiOp, was necessary to achieve actual recovery. NOAA found that although there are some populations that will attain the ICTRT thresholds as a result of mitigation in the BiOp, many of

¹⁵ For example, for Snake River Spring/Summer chinook, the Tucannon population would need a 33% change (reflected as 1.33) to achieve a 5% recovery/viability goal, whereas the Catherine Creek population will achieve the 5% recovery/viability goal (reflected as 0.93) under the BiOp’s mitigation. SCA Appendix B at 4

the populations will need a significant amount of change across all the “H’s” before an ESU reaches the ICTRT thresholds. That is why the BiOp expressly concludes for many ESUs that “[t]his does not mean that recovery will be achieved without additional improvements in various life stages.” See BiOp at 8.3-42; see also *id.* (“increased productivity will result in higher abundance, which in turn will lead to an eventual decrease in productivity due to density effects, until additional improvements resulting from recovery plan implementation are expressed.”). All of this was done to assess which ESUs would attain recovery within the 10-year time span of the 2008 BiOp and which would need additional actions from recovery plans. Those assessments, in turn informed NOAA’s overall conclusion that each of these ESUs are expected to survive with an adequate potential for recovery. The total analysis was reasonable and should be afforded deference.

Plaintiffs similarly miss the mark on the legal side.¹⁶ They revert to their familiar argument insisting that NOAA must conduct its jeopardy analysis, and in particular the recovery inquiry, by insisting that NOAA must calculate “what recovery abundance levels and time frames would look like”, NPT Resp at 6, that NOAA must articulate the “connection . . . between the consequences of the action and the attributes of *actual* recovery for that species”, *id* at 8 (emphasis added), and how the operation of FCRPS must be “keyed to the actual recovery

¹⁶ Oregon and the Nez Perce Tribe shift their argument and contend that even if the legal standard for the recovery prong is “adequate potential for recovery”, that standard is still not enough to satisfy their desired jeopardy analysis. See Oregon Resp. at 4 (“Whether properly characterized as ‘trending towards recovery,’ or as ‘*expected to survive with an adequate potential for recovery,*’ NOAA’s jeopardy standard fails to comply with the ESA.”) (emphasis added); see also NPT Resp. at 6 (“They state that ‘trending towards recovery is not and was not their standard for implementing the jeopardy regulation, and that an ‘adequate potential for recovery’ is This or that phrase is not the issue.”). Besides directly conflicting with Ninth Circuit precedent, this surprising shift is never explained, nor do the Plaintiffs articulate a reason why NOAA’s “adequate potential for recovery” – a standard clearly endorsed by the Ninth Circuit is impermissible.

needs of the species.” NWF Resp. at 7. Plaintiffs’ proffered standard and methodology for conducting a jeopardy analysis is, however, simply at odds with controlling precedent in this Circuit. See Fed. Defs.’ MSJ Mem. Supp. at 33-36; Fed. Defs.’ MSJ Reply at 21-23. As this Court has said many times, we must follow the law, and the law is unequivocal in this respect: Courts may not “impose ‘procedural requirements [not] explicitly enumerated in the pertinent statutes.’” *Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008) (*en banc*); *see also League of Wilderness Defenders v. Forest Service*, 549 F.3d 1211 (9th Cir.2008) (9th Cir. Dec. 11, 2008) (recently confirming this instruction in regulatory context). In fact, every Court that has addressed the near-identical argument that Plaintiffs press here has firmly rejected it, including the Ninth Circuit in *Salmon Spawning & Recovery Alliance v. NMFS*, 2009 WL 2487917 (9th Cir. Aug. 14, 2009)¹⁷ and this District Court in *Northwest Environmental Defense Center v. NMFS*, – F. Supp.2d –, 2009 WL 2486039 *12 (D.Or. Aug. 12, 2009). These cases recognized that if NOAA conducts a recovery inquiry, as was undisputedly done in the 2008 FCRPS BiOp, the Court may not graft additional regulatory components into the analysis and must defer if the analysis is reasonable. *Salmon Spawning & Recovery Alliance*, 2009 WL 2487917 at *1 (“[d]eciding how to assess, and indeed the assessment of, the impact of [an agency action] on an ESU’s potential for recovery ‘involves a great deal of predictive judgment. Such judgments are entitled to a particularly deferential review.’”) (citing *Trout Unlimited*, 559

¹⁷ The Plaintiffs attempt to distinguish *Salmon Spawning & Recovery Alliance* by suggesting that FCRPS must be held to higher standard than a harvest and hatchery BiOp because of the relative magnitude of the effect. NWF Resp. at 6 n.6; *see also* NPT Resp. at 7 (“Comparing that narrow, secondary action to the undisputedly dominant FCRPS hydropower at action here . . .”). The statute, regulation, and case law do not differentiate among agency actions and must be applied equally and consistently. 50 C.F.R. § 402.02. Picking and choosing when to apply the ESA, or applying a heightened standard to those actions that the Plaintiffs believe should shoulder more of the burden, are not a credible legal arguments.

F.3d at 959). Indeed, since the filing of our response on September 15, 2009, yet another court has confirmed this reading of the regulation. *See Center for Biological Diversity v. BLM*, 06-CV-04884-SI (N.D. Cal.) (“FWS explicitly found that the proposed actions improve conditions for the desert tortoise and afford the opportunity for the species’ recovery. Unlike the ‘structural’ flaw in the [2004] *NWF* BiOp where the agency did not address recovery needs whatsoever, here the WEMO and NECO BiOps repeatedly address recovery and conclude that the proposed plan will not reduce appreciably the *likelihood of recovery*, but in fact will promote recovery.” Order at 59-60 (citations omitted) (emphasis added) (Attached Fed. Defs.’ Ex. 1). The overwhelming body of case law supports NOAA’s analysis here.

While Plaintiffs state that they do not seek to import recovery planning into a Section 7(a)(2) context, their current briefing again belies this protestation.¹⁸ Throughout the Administration’s five month review the Plaintiffs have been abundantly clear – they seek a jeopardy standard that will *further* “actual recovery.” To them, anything less is “lowering the

¹⁸ The difference between Section 7(a)(2) and Section 4(f) is best explained by examining NOAA’s recently released recovery plan for the Mid-Columbia Steelhead DPS (“Mid-C recovery plan”). *See* <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Interior-Columbia/Mid-Columbia/Mid-Col-Plan.cfm>. The Mid-C recovery plan was the result of a collaborative effort among many sovereigns including the State of Oregon. Recovery Plan Summary (“Rec. Pl. Summ.”) at 2. This collaborative effort utilized the hydro and estuary modules developed for the 2008 FCRPS BiOp, the hatchery analysis in the Supplemental Comprehensive Analysis (“SCA”), and harvest plan in *United States v. Oregon*, and while much of the analysis borrows heavily from the consultations at issue here, there is a marked difference between the FCRPS BiOP and the Mid-C recovery plan. *Id.* at 1. The recovery plan: (1) sets out the recovery goals for this DPS (utilizing the TRT data), *see id.* at 7; (2) provides a strategy and specific actions to achieve recovery, *see id.* at 8-13; and (3) estimates the time it will take (25-50 years) and the costs (\$996 million) to attain the TRT goals. *Id.* at 14. These estimates are largely based on suite of actions where there is a sincere intention to complete the tasks, but NOAA cannot state that they are “reasonably certain to occur” as it must in a Section 7(a)(2) context. NOAA has mapped these actions and if completed, the entire plan will increase the species chances of recovery.

bar.” OR Resp. at 3. Whether this is based on a theory of how the jeopardy standard must be “forward looking”, NWF Resp. at 7¹⁹, or more straightforward, *see* NPT Resp. at 6 (“what recovery abundance levels and time frames would look like”), Plaintiffs’ base request remains the same – they seek established abundance levels, time frames, and objective criteria, to ensure that these species will indeed recover as a result of the agency action , or if the agencies fail to meet the criteria, an opportunity to litigate to enforce that the agency action results in actual recovery.

The key here, and the critical piece the Plaintiffs miss, is that they seek a standard by which *the agency action* has to *result in actual recovery*. That is, they seek a ten-year action that is reasonably certain to occur and that results in the recovery of a species within a predicted time frame. This is not Congress’ intent or the standard imposed by ESA Section 7(a)(2). Rather, Plaintiffs’ interpretation conflates Section 7(a)(2) with Section 4(f) and is not consistent with guidance from Ninth Circuit in *NWF v. NMFS*, 524 F.3d at 930. *See also Salmon Spawning and Recovery Alliance*, 2009 WL 2487917 * 1 (“While *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 931-33 (9th Cir.2008), precluded NMFS from ‘simply avoid[ing] any consideration of recovery impacts,’ *id.* at 932, it was careful not to require NMFS to ‘import ESA’s separate recovery planning provisions into the section 7 consultation process,’ *id.* at 936.”). This Court, however, has appropriately emphasized that resolution of this case will be dictated by a faithful application of the law. Here, NOAA’s standard fully and faithfully complies with the law and should be upheld.

III. THE SEPTEMBER 15 MATERIALS CAN BE PROPERLY CONSIDERED

¹⁹ Even though NWF was granted many opportunities, they never explained why the “base to current” and “current to prospective” analysis in the BiOp is not forward looking. *But see* BiOp at 1-12 (“[this inquiry] calls for a forward looking evaluation . . .”).

UNDER ESTABLISHED EXCEPTIONS TO RECORD REVIEW PRINCIPLES.

At the start of this process the Plaintiffs indicated that they welcomed a review of the 2008 FCRPS BiOp and looked forward to this Administration's response. May 1, 2009, Letter to the Court from Oregon, Nez Perce Tribe, and NWF plaintiffs at 1 ("We are pleased that the leadership of the new administration has decided to take time to 'more fully understand all aspects of the [2008 FCRPS] BiOp. . . . Our clients look forward to the opportunity to meet with agency leaders in the near future to assist them in their review.'). During this time they repeatedly pressed this Court to issue guidance to the agencies, which would necessitate a response from the Administration. *Id.*; *see also* June 15, 2009, Letter to the Court from Oregon, Nez Perce Tribe, and NWF plaintiffs (Docket No. 1703). This Court did indeed issue guidance and in turn the Administration compiled a response. Now, the Plaintiffs argue that the Court cannot consider any of the materials submitted on September 15, 2009. *See* NWF Resp. at 31-37; OR Resp. at 5-7; NPT Resp. at 22-24.

Plaintiffs' arguments, however, ignore that this Court's May 18 letter requested such a response and expressly urged consideration of the adaptive management framework to address its concerns. Moreover, this Court has already confirmed that it can accept extra-record material under one of the Ninth Circuit's enumerated exceptions to the record review rule. In its May 18 letter to counsel, the Court set out its tentative position on the 2008 BiOp in order to further the goals of exploring *all* legal avenues for resolving the matter, as well as suggesting additional actions that may avoid another remand. Doc. 1699 at 1. Recognizing that the concept of 'adaptive management' is flexible enough to allow the implementation of "additional and/or modified mitigation actions within the structure of the existing BiOp," the Court urged implementation of six measures "as part of the adaptive management process." Doc. 1699 at 2.

While “all ‘possible legal avenues’” during the review period certainly included the potential for agreement with the State of Oregon, the Nez Perce Tribe and the NWF Plaintiffs, the Administration leadership was not bound to the only two options suggested by Plaintiffs: (1) reach an agreement with Plaintiffs; or (2) leave the 2008 BiOp and plans for its implementation entirely untouched. However, the option settled upon by the Administration, after many months of consideration of the Court’s May 18 letter, the parties’ positions, the views of scientists in and outside of the federal government, and meetings with Plaintiffs, is also valid. The fact that an agreement was not reached with Plaintiffs does not negate the Court’s proper suggestion of addressing additional concerns through adaptive management or the Administration explaining to the Court and the parties how it has done so.

The arguments presented by the Plaintiffs rest on the unremarkable proposition that the APA record review rule prohibits mere *post hoc* rationalization. *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (Post-decision information “may not be advanced as a new rationalization for either sustaining or attacking an agency’s decision.”). However, the Ninth Circuit recognizes four exceptions in which the reviewing court may consider extra-record materials, discussed below. Furthermore, the Ninth Circuit recognizes situations in which a court can obtain further explanation from the agency. *Asarco v. EPA*, 616 F.2d 1153, 1159-60 (9th Cir. 1980); *see also Camp v. Pitts*, 411 U.S. at 142-43 (same); *Friends of the Payette v. Horsehoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993).

As the D.C. Circuit has clarified:

[The] rule is not a time barrier which freezes an agency’s exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers. Thus the rule applies to rationalizations offered for the first time in litigation affidavits and arguments of counsel. The policy of the post hoc

rationalization rule does not prohibit [an agency] from submitting an amplified articulation of the distinctions it sees.... Moreover, the logic of the rule requires it. If a reviewing court finds the record inadequate to support a finding of reasoned analysis by an agency and the court is barred from considering rationales urged by others, only the agency itself can provide the required clarification.

Alpharma, Inc. v. Leavitt, 460 F.3d 1, (D.C. Cir.,2006) (quoting *Local 814, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen v. N. L. R. B.*, 546 F.2d 989, 992 (D.C.Cir.1976)). The Court's May 18 letter certainly invited such explanation from the 'proper decisionmakers' with respect to its tentative critiques of the 2008 BiOp and its suggestions for adaptive management, as well as subsequent indications that such an explanation would be accepted. *See e.g.* Doc. 1705, Attachment 2 ("We look forward to the administration leadership's perspectives...")

Plaintiffs' arguments are also at odds with their submission of hundreds of pages of extra-record declarations used for the improper purpose of directly critiquing the 2008 BiOp. In denying our motion to strike, the Court held that in this case, extra-record information may be necessary to determine whether NOAA considered all relevant factors and explained its decision, or whether the materials are necessary to explain technical or complex subject matter. Doc. 1619 at 4, fn 4. The Court declared that it would apply these exceptions to material also submitted by Federal Defendants and other parties. *Id.* at 5. Here, the September 15, 2009 materials can also be considered under these exceptions, particularly the exception allowing additional materials to explain technical or complex subject matter. *See also* October 2, 2009, Order (recognizing the potential application of these record review exceptions to underlying documents supporting the Administration's conclusions and the development of the AMIP) (Docket No. 1722).

At bottom, Plaintiffs' objection to these materials stands in opposition to the Court's own invitation to provide such explanation and two prior rulings of this Court that application of the

Ninth Circuit's exceptions can result in consideration of extra-record documents. The Court can properly consider the September 15, 2009 filing and it should do so, as it evidences the thorough and in-depth response to the Court and the parties' concerns regarding the 2008 BiOp.

IV. THE ADMINISTRATION'S RESPONSE TO OREGON'S PROPOSED FRAMEWORK

The Administration appreciates that Oregon has proposed a framework that it believes could result in the resolution of this case. OR Resp. at 33. We must respectfully decline this suggestion.

Apparently, the proposed course of action would be in lieu of having the Court rule immediately on the pending motions. Instead, a "pre-constructed plan" would be established to guide a new collaborative effort, although the participants are not identified. Oregon does not specify how such a "plan" would be arrived at as an alternative to the Court's ruling at this time. Oregon makes clear its continuing disagreement on the legal objectives of an ESA jeopardy standard, but asks the Federal Defendants' to essentially put aside their understanding of the ESA, and interpretive court decisions, and "adopt measures . . . that ensures protected species are on a predictable and sustainable track to recovery." OR Resp. at 33.

Throughout this remand the Federal agencies have discussed these issues in the collaboration (and separately) with Oregon. Oregon has consistently taken the position that the FCRPS BiOp must apply a jeopardy standard that is unique to this particular agency action whereby the FCRPS ensures protected species are on a predictable and sustainable track to recovery. OR Resp. at 33. Oregon has never reconciled how it can demand a "heightened" jeopardy standard and simultaneously reach a comprehensive agreement wherein this BiOp may yet be salvageable. *Id.* Furthermore, in reading their proposed framework, it becomes clear that this case is really about a fundamental legal and philosophical difference of whether habitat

projects -- in combination with hydro, harvest, and hatchery modifications -- can be used to mitigate for the adverse effects of the FCRPS system or whether the Federal agencies must mitigate for these effects entirely through hydro modifications alone. Put simply, according to Oregon, habitat cannot mitigate for hydro.

We would also note that much of what Oregon demands is already being addressed in the BiOp, as implemented by the AMIP. Oregon calls for more work on the AMIP's biological triggers, which is already called for in the AMIP. Similarly, the work on contingency actions will be ongoing seeking further refinement in accordance with the best available science and existing legal authorities. This is equally true for the ongoing measures to improve salmon survival and adult return such as spill and dam passage technology. Finally, Oregon's call for RME measures for ESA-listed salmonids recommended by the Columbia Fish and Wildlife Authority are already included in the AMIP. In short, the BiOp's adaptive management framework is robust and we look forward to Oregon being a part of that process along with the other sovereigns.

Finally, we would note that Oregon's objectives for the listed species, which the Federal Defendants share, are the objectives of ESA recovery planning through Section 4(f). After all, it is through NOAA's efforts and regional processes that Technical Recovery Teams were formed and the criteria for recovery planning developed. NOAA continues to be willing to engage with Oregon on its issues to arrive at meaningful recovery plans for each of the listed species. Recovery plans under Section 4(f), not biological opinions under Section 7(a), are the proper forum for Oregon and all interested sovereigns and parties to engage on these issues. Oregon and the region's scientists will be encouraged to participate in this important work.

While the Administration appreciates Oregon's gesture, irreconcilable differences and

unsuccessful discussions between the Federal agencies and the State demonstrate that an agreement is not possible. We must respectfully decline Oregon's suggestion. It is time for the Court to rule on the pending motions.

CONCLUSION

Due in no small part to the Court's rulings, the FCRPS BiOp is the most comprehensive and robust BiOp ever issued on the FCRPS and includes the commitments to unprecedented funding that the Court had sought in 2003. The substantial regional support, as a result of the collaboration encouraged by this Court, increases our confidence that the plan will succeed. The Court knows where the Federal government stands on all of the issues. The 2008 FCRPS BiOp as implemented through the AMIP fully complies with the law. Yet, the Plaintiffs are still unsatisfied and believe that by striking down this BiOp there will be "substantive change and the start of a new day." NWF Resp. at 38. If the Court rejects this BiOp and the commitments to unprecedented levels of funding, it will send this region back to the drawing board. This is a result the salmon and steelhead can ill afford. For the reasons discussed above, the Court should grant Federal Defendants' cross-motion for summary judgment and enter judgment on their behalf.

Respectfully submitted: October 23, 2009.

JOHN CRUDEN
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY
Assistant Section Chief

/s/ Coby Howell
COBY HOWELL
BRIDGET McNEIL
MICHAEL R. EITEL, Trial Attorney

Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on October 23, 2009, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

Dr. Howard F. Horton, Ph.D.
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, Oregon, 97331-3803
FAX: (541)-737-3590
(hortonho@onid.orst.edu)

Walter H. Evans, III
Schwabe Williamson Wyatt, P.C.
1211 S.W. Fifth Ave
1600-1800 Pacwest Center
Portland, OR 97204
(wevans@schwabe.com)

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83051

/s/ Coby Howell